August, 1992

HONOR ROLL

389th Session, Basic Law Enforcement Academy - April 1 through June 19, 1992

President: *Officer Misipati S. Bird - Yakima Police Department*
Best Overall: *Officer Steven P. Gatterman - Western Wash. University P.D.*
Best Academic: *Officer D. Michelle Steinmetz - Department of Fisheries*
Best Firearms: *Officer Eduardo Quiles - King County Police Department*
Best Mock Scenes: *Deputy Grant F. Hopper - Kitsap County Sheriff's Department*

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Corrections Officer Academy - Class 169 - June 1 through June 26, 1992

Highest Overall: *Officer Teresa M. Williams - WA Corrections Center for Women*
Highest Written: *Officer Michael J. Rogers - Washington Corrections Center*
Highest Practical Test: *Officer Kip I. McKim - Washington Corrections Center for Women*
Highest in Mock Scenes: *Officer Brenda J. Otto - Washington Corrections Center*
Officer Teresa M. Williams - WA Corrections Center for Women
Highest Defensive Tactics: *Officer Darrell W. Damron - Washington State Reformatory*

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UNITED STATES SUPREME COURT

ENTRAPMENT FOUND AS A MATTER OF LAW WHERE NEBRASKA FARMER ORDERED CHILD PORN AFTER TWO YEARS OF UNDERCOVER EFFORTS BY GOVERNMENT

Jacobson v. U.S., 51 CrL 2001 (1992)

Facts and Proceedings: (Excerpted from Court's syllabus of majority opinion, not opinion itself; some modifications of syllabus by LED Ed.)

> At a time (1984) when federal law permitted such conduct, Jacobson (a 56-year-old veteran-turned-farmer who supported his elderly father in Nebraska) ordered and received from a bookstore two Bare Boys magazines containing photographs of nude preteen and teenage boys. Subsequently, the Child Protection Act of 1984 made illegal the receipt through the mails of sexually explicit depictions of children.
>
> After finding Jacobson's name on the bookstore mailing list, two Government agencies sent mail to him through five fictitious organizations and a bogus pen pal, to explore his willingness to break the law. Many of those organizations represented that they were

founded to protect and promote sexual freedom and freedom of choice and that they promoted lobbying efforts through catalog sales. Some mailings raised the spectre of censorship. Jacobson responded to some of the correspondence. After 2 1/2 years on the Government mailing list, Jacobson was solicited to order child pornography. He answered a letter that described concern about child pornography as hysterical nonsense and decried international censorship, and then received a catalog and ordered a magazine depicting young boys engaged in sexual activities.

He was arrested after a controlled delivery of a photocopy of the magazine, but a search of his house revealed no materials other than those sent by the Government and the Bare Boys magazines. At his jury trial, he pleaded entrapment and testified that he had been curious to know the type of sexual actions to which the last letter referred and that he had been shocked by the Bare Boys magazines because he had not expected to receive photographs of minors. He was convicted, and the Court of Appeals affirmed.

ISSUE AND RULING: Did the government submit sufficient evidence of Jacobson's predisposition to violate the child pornography laws to negate his entrapment defense? (ANSWER: No, rules a 5-4 majority) Result: Nebraska federal district court conviction for violating federal child pornography laws and Court of Appeals ruling reversed.

ANALYSIS BY MAJORITY: (Excerpted from Court's syllabus of majority opinion, not opinion itselt; some modifications of syllabus by LED Ed.)

The prosecution failed, as a matter of law, to adduce evidence to support the jury verdict that Jacobson was predisposed, independent of the Government's acts and beyond a reasonable doubt, to violate the law by receiving child pornography through the mails. In their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute.

Jacobson was not simply offered the opportunity to order pornography, after which he promptly availed himself of that opportunity. He was the target of 26 months of repeated Government mailings and communications, and the Government has failed to carry its burden of proving predisposition independent of its attention. The preinvestigation evidence -- the Bare Boys magazines -- merely indicates a generic inclination to act within a broad range, not all of which is criminal. Furthermore, Jacobson was acting within the law when he received the magazines, and he testified that he did not know that they would depict minors.

As for the evidence gathered during the investigation, Jacobson's responses to the many communications prior to the criminal act were at most indicative of certain personal inclinations and would not support the inference that Jacobson was predisposed to violate the Child Protection Act. On the other hand, the strong arguable inference is that, by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited Jacobson's interest in material banned by law but also exerted substantial pressure on him to obtain and read such material as part of the fight against censorship and the infringement of individual rights. Thus, rational jurors could not find beyond a reasonable doubt that Jacobson possessed the requisite predisposition before the Government's investigation and that it existed independent of the Government's many and varied approaches to him.

DISSENT:

Justice O'Connor's dissent (joined by Rehnquist, Kennedy and Scalia) criticizes the majority opinion as being unprincipled and result-oriented, and as a usurping of the jury's authority to decide the facts. She also worries that the majority opinion will be cited by defense counsel to successfully defend against prosecutions resulting from sting operations previously considered legitimate by a majority of the court. She is also concerned that some lower courts may erroneously construe the majority opinion as requiring "reasonable suspicion" of criminality before a suspect can be targeted for undercover investigation.

The majority responds to Justice O'Connor's dissent by asserting that its decision does not actually change the law regarding predisposition and entrapment. The majority declares:

> Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs, and, if the offer is accepted, make an arrest on the spot or later. In such a typical case, or in a more elaborate "sting" operation involving government-sponsored fencing where the defendant is simply provided with the opportunity to commit a crime, the entrapment defense is of little use because the ready commission of the criminal act amply demonstrates the defendant's predisposition. Had the agents in this case simply offered [Jacobson] the opportunity to order child pornography through the mails, and [Jacobson] -- who must be presumed to know the law -- had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction.
>
> But that is not what happened here. By the time [Jacobson] finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at [Jacobson] since January 1985.

[Citations omitted]

LED EDITOR'S COMMENT:

Maybe we're guilty of wishful or magical thinking, but we predict this case will ultimately be distinguished on its facts in future cases until it has virtually no precedential value. This case will ultimately stand for the proposition that (these are our words) "It's lonely on the prairie for a 56-year-old-lifetime-bachelor-farmer-probably-a-homosexual-in-the-closet so you can't prosecute him after you seduce him over a two-year period to buy a single item of child pornography even if he bought some once before when it was not illegal."

Presumably, not very many defendants will be able to meet this test. Little in the majority opinion (other than the result) supports the suggestion by the dissent that others will mistakenly read the majority opinion to mean that "reasonable suspicion" must be present in order to target an undercover subject. However, the majority opinion does cite with approval an internal guideline of the FBI which cautions FBI agents that inducement to commit crime should not be offered unless:

> **(a) there is a reasonable indication, based on information developed through**

informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or
(b) the opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity.

While this internal FBI guideline does not state a legal requirement for avoiding the entrapment defense, it does provide a good guideline for avoiding situations where the defense might be raised. If such prior indications of predisposition can be identified before making an offer, entrapment will be a very difficult defense to make.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) PROVISIONS FOR NONJUDICIAL, AGENCY-AUTHORIZED SINGLE PARTY CONSENT RECORDING UNDER 1989 AMENDMENTS TO PRIVACY ACT HELD CONSTITUTIONAL - In State v. Salinas, 119 Wn.2d 192 (1992) the Washington State Supreme Court holds that RCW 9.73.230, which was adopted in 1989 and establishes a in-agency, non-judicial procedure for obtaining a police supervisor's (above level of first-line supervisor) authorization to intercept, transmit, or record conversations with the consent of only one party to the conversation in certain specified drug investigation situations, does not violate the privacy protections of Washington Constitution article 1, section 7.

The Supreme Court also holds: (1) that the probable cause standard of RCW 9.73.230, upon which the supervisor's authorization is to be based, is the same standard of probable cause as applies in determining the lawfulness of arrests or searches with or without a warrant; and (2) that the probable cause determination of the supervisor in this case was correctly made under the Aguilar-Spinelli probable cause test, in that the report gave a detailed basis for the informant's conclusions and showed the informant's credibility through the following track-record information (as set forth in the supervisor's affidavit):

> Davis has assisted the King County Police Drug Enforcement Unit within the last month in another drug investigation. In that case two (2) suspects were arrested and 10 (ten) ounces of suspected cocaine were seized. Charges have been filed in that case for violation of the Uniform Controlled Substances Act and one suspect is awaiting trial.

Justice Utter writes a lone concurring opinion addressing only the article 1, section 7 privacy issue. He says that the element of the statute which saved it (in his view) from state constitutional challenge is the provision of subsection (7)(a) of RCW 9.73.230 which requires an ex parte followup judicial determination of whether the supervisor had probable cause to support his or her authorization.

Result: King County Superior Court conviction of Ruben R. Salinas for possession of cocaine with intent to deliver affirmed.

LED EDITOR'S COMMENTS:

All Washington law enforcement agencies should already have a copy of "Guidelines For One Party Consent" produced by the One Party Consent Committee of the Washington Association of Sheriffs and Police Chiefs. An IBM disc of the document may be obtained for duplication of the "Guidelines" by contacting Sgt. Butch Watson, Redmond Police Department. The legal views and recommended procedures set forth in that 1989 manual

all appear to be current. With the decision in Salinas, there would appear to be no constitutional impediment to the implementation of the 1989 amendment to RCW 9.73.

(2) PRIVACY ACT'S EXEMPLARY DAMAGES PROVISION NOT APPLICABLE WHERE THE UNAUTHORIZED INTERCEPTION IS INADVERTENT AND THE CONVERSATION INTERCEPTED IS INCONSEQUENTIAL - In Kadoranian v. Bellingham Police Department, 119 Wn.2d 178 (1992) the Washington Supreme Court affirms that trial court's dismissal of a civil lawsuit brought against the Bellingham Police Department by the 15 year-old daughter of a suspected Canadian drug dealer.

Bellingham Police Officers had obtained supervisory authorization under RCW 9.73.230 to intercept and record a telephone call from Washington to the Canadian residence of Kevorak (George) Kadoranian. Pursuant to established procedures, the recording device was activated before the phone number was dialed. The phone was answered by Kadoranian's 15-year-old daughter and her entire conversation with the police is as follows:

Ms. Kadoranian: Hello?
[Carino]: Hi, is your dad there?
Ms. Kadoranian: No, he's not, can I take a message?
[Carino]: Uh, it's, uh, tell him I had problems with the car and I'll phone him back later.
Ms. Kadoranian: You have . . .
[Carino]: Problems with the car, and I'll phone back later.
Ms. Kadoranian: All right.
[Carino]: OK.
Ms. Kadoranian: OK. Bye.
[Carino]: Bye.

Ms. Kadoranian ultimately sued the Bellingham Police Department in a class action, seeking statutory exemplary damages of $25,000 (see RCW 9.73.230(11)), including in her class persons answering wrong number calls,long distance operators, and receptionists all of whom might be recorded under the Bellingham procedure of activating the recording device before making the call. The police department was granted summary judgment in the superior court, and Ms. Kadoranian appealed to the Supreme Court.

The Supreme Court declares that two determinative issues were presented: (1) Does Washington's Privacy Act prohibit interception of phone conversations with persons located in foreign countries? (2) Where a person's inconsequential conversations are inadvertently intercepted and recorded is the person entitled to exemplary damages under chapter 9.73 RCW? The Court's analysis on these two issues is as follows:

(1) Territorial Authority

In rejecting Ms. Kadoranian's argument that an authorization granted by a police supervisor pursuant to RCW 9.73.230 allows interception only of conversations initiated and received within the State of Washington, the Court declares that the purpose of the 1989 amendments to chapter 9.73 was to expand police authority, not to restrict it, and nothing in chapter 9.73 indicates the limitation urged by Ms. Kadoranian. Accordingly, the court rejects her challenge on territorial authority. (She also raised an issue under Canadian law, but she failed to properly make a record and argue this point, so the Supreme Court declines to address this issue, although the Court does appear to say that the lawfulness of an interception by Washington officers in a

communication originating in Washington is to be determined under Washington law, not Canadian law.)

(2) Intercepting inadvertent, inconsequential conversations

Ms. Kadoranian urged that the Court adopt a strict rule against recording conversations involving non-suspects. She urged that the Court establish a rule that police must wait until the actual target is on the line before beginning any recording. The Court rejects this argument, declaring as follows:

> The record in this case indicates, however, that the nonconsenting party to the conversation would be able to detect the beginning of a tape recording if the recording device were turned on after the conversation had commenced. The record before us indicates that in order to be made without the knowledge of the nonconsenting party, the recording had to begin before the conversation began. Furthermore, the recording of any such conversation must be done "in such a manner that protects the recording from editing or other alterations." To hold that a tape recorder cannot be turned on until after the target of the investigation comes on the line would make the 1-party consent statute unworkable.

Accordingly, the Court holds that the exemplary damages provision of chapter 9.73 RCW will not be applied to inadvertent interceptions of inconsequential conversations with persons who are not the target of the investigation. In addition, the Court holds that the conversation was not even "private" within the meaning of Chapter 9.73 RCW, declaring:

> When Ms. Kadoranian answered the home telephone, there is no indication she knew who the caller was. She gave general information, without requiring identification from the caller, and without asking the caller's reason for wanting to talk to her father. There is no reason to believe that Ms. Kadoranian would have withheld this information from any caller. It does not appear that Ms. Kadoranian intended to keep the information (the fact that her father was not home) "secret" or that she had any expectation that her conversation was private.
>
> We thus conclude that the very brief communication between Mr. Carino and Ms. Kadoranian was not a "private" communication or conversation. Like the long distance operator's comments, the comments of Ms. Kadoranian were inconsequential, non-incriminating and made to a stranger. They were not the kind of communication that the privacy act protects.

Result: Whatcom County Superior Court order dismissing the lawsuit affirmed.

(3) EXPECTATION OF PRIVACY NON-EXISTENT OR AT LEAST VERY LIMITED IN OPEN COMMERCIAL CRACK HOUSE; UNDERCOVER OFFICERS' USE OF RUSE TO GAIN CONSENT TO ENTRY NOT SUBJECT TO THRESHOLD REASONABLE SUSPICION REQUIREMENT - In State v. Hastings, 119 Wn.2d 229 (1992) the State Supreme Court rules that entry of a "crack house" by undercover Seattle police officers posing as drug purchasers, and their observations of drug-dealing going on inside the house (information later incorporated into a search warrant affidavit), was lawful: (a) because the occupants of the house had turned the house into a commercial premises and therefore had no expectation of privacy portions of the house open for business; and (b) alternatively, even if the entry was a "search", consent to the entry by the undercover officers justified their entry, and their activity inside the premises was consistent with

their undercover role, and hence their search did not exceed the scope of the consent.

Four justices (Brachtenbach, Andersen, Guy and Dore) sign the majority opinion authored by Justice Durham stating the above-described rationale for ruling in favor of the State. In the part of her opinion addressing the consent search issue, Justice Durham strongly signals in regard to police usage of ruses that an earlier Court of Appeals ruling in State v. Hashman, 46 Wn. App. 211 (1986) [April '87 LED:19] is not the law in Washington. The Hashman ruling had been that police may not use a ruse to gain entry into private premises unless police have prior reasonable suspicion of criminal activity in that location. Justice Durham says that this threshold reasonable suspicion requirement for ruses "is an unnecessary limitation on undercover police investigations" and "serves no valid purpose."

Justice Utter writes a concurring opinion joined by Justices Smith, Johnson and Dolliver in which he agrees with the result reached by the majority, but in which he disagrees with both alternative rationales offered by the majority. While Justice Utter is clearer in articulating his criticism of Justice Durham's opinion than in articulating his rationale in support of affirming the conviction, we think that his rationale can be paraphrased as follows: There is an expectation of privacy even in a commercial crack house, but undercover officers posing as drug purchasers can obtain consent to enter the premises, and so long as they do not search areas or seize items inconsistent with their roles and the consent granted, their entry and observations in their undercover role is lawful.

LED EDITOR'S COMMENT:

1. Expectation of privacy

In regard to Justice Utter's criticism of Justice Durham's first rationale (i.e., that there is no expectation of privacy in a commercial crack house and hence can be no "search" of such a place), arguing that even a commercial premises is entitled to some privacy, we believe that Justice Utter is correct. The better approach is to assume some privacy protection for the premises and to then determine whether a valid consent to entry was given and whether the scope of the "search" was consistent with the scope of the consent. Validity of the consent was clear here; a doorman at a crack house has at least "apparent authority" (in the words of Justice Utter) to admit rock cocaine customers. The officers stayed strictly within areas of the house consistent with their role as drug buyers.

2. Defining "ruse"

Justice Utter criticizes Justice Durham's analysis on the "ruse" issue, arguing that there was no "ruse" here because the undercover officers honestly said they were at the house to buy rock cocaine and they did. Hence, Justice Utter argues, Justice Durham should not have addressed Hashman and its threshold reasonable suspicion requirement for the use of ruses. He characterizes her criticism of Hashman as "purely nonbinding dicta." On this point, we strongly disagree with Justice Utter. Professor LaFave's treatise, Search and Seizure, classifies two types of ruses -- ruse as to identity and ruse as to purpose. LaFave at section 8.2(m) and (n).

There clearly was a ruse here as to identity. How can this not be termed a "ruse?" Because of his unarticulated narrow definition of "ruse", Justice Utter offers no reason why one type of ruse should have a different rule applied to it than the other type of ruse. La Fave's discussion of ruses offers no basis for a distinction either.

We hope that trial courts and the Court of Appeals will follow the lead of Justice Durham on the ruse issue. Justice Durham has clearly stated the view of five justices that there is no basis for the Hashman threshold reasonable suspicion requirement for ruses, and there is no reason for a trial court or the Court of Appeals not to follow her lead. We think that undercover officers posing as prospective purchasers of illegal drugs are using a ruse. Consistent with Justice Durham's opinion, they should not be required to articulate prior reasonable suspicion to justify their use of a ruse. If they are convincing in their role and obtain entry, their entry should be deemed to have been gained by consent. And if they do not act inconsistently with their "drug buyer" role, then their observations will be lawful.

(4) TACOMA'S DRUG LOITERING LAW WITHSTANDS CONSTITUTIONAL CHALLENGE - In Tacoma v. Luvene, 118 Wn.2d 826 (1992) the City of Tacoma's drug loitering ordinance is upheld by the State Supreme Court against a broad-based challenge. The Court rejects defendant's theories of: (1) constitutional preemption, (2) constitutional overbreadth, (3) constitutional vagueness, (4) insufficiency of the evidence to convict, and (5) invalidity of an emergency clause in the original ordinance. Result: Tacoma Municipal Court conviction for drug loitering affirmed.

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WASHINGTON STATE COURT OF APPEALS

TOTALITY OF CIRCUMSTANCES ADD UP TO REASONABLE SUSPICION FOR TERRY STOP

State v. Pressley, 64 Wn. App. 591 (Div. I, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals majority opinion)

> Pressley was charged with one count of possession of a controlled substance in violation of the Uniform Controlled Substances Act, RCW 69.50.401(d). Before trial the court heard and denied a CrR 3.6 motion to suppress the cocaine seized by the arresting officer. At issue were two questions: whether the initial stop was a valid Terry stop and whether the subsequent seizure exceeded the scope of the investigative stop. The trial court's findings of fact are unchallenged by either party and effectively summarize the testimony:
>
> > . . .
> > 2. On December 5, 1989 at about 5:45 p.m., Seattle Police Officer Mike Korner was on routine patrol near the vicinity of 20th and Yesler in Seattle, King County, Washington.
> > 3. That location is well-known to the police for narcotics transactions and gang activity. Officer Korner has training in the identification of narcotics, and is familiar with the packaging of narcotics, and is familiar with the packaging of narcotics and how they are hidden, sloughed and destroyed. He has been trained to watch the hands of people suspected of being engaged in narcotics transactions. Officer Korner has participated in buy/bust operations at Yesler and 20th. Citizens have also requested the police to patrol the area because of the number of narcotics transactions at that location.
> > 4. As Officer Korner approached 20th and Yesler he saw the respondent

standing next to a building beside another young female. Their hands were chest high and the respondent appeared to be pointing to an object in her hand or counting objects in her hand. The other female was intently looking at the objects in the respondent's hand.

5. Officer Korner thought that he was witnessing a narcotics transaction because of the location, the fact that the respondent and her companion were huddled together, and because the respondent was pointing to an object in her hand, which could be a narcotic such as rock cocaine. When Officer Korner has observed drug transactions he has commonly seen the seller and buyer examine the drugs before the transaction is completed.

6. Officer Korner drove up to the respondent in his marked patrol car. The respondent looked up at him, said "Oh Shit" and immediately closed the hand that contained the objects. The respondent and her companion then separated and walked off in different directions.

7. When Officer Korner saw the respondent react to his presence, close her hand and walk away from her companion he had further reason to believe he had interrupted a narcotics transaction.

8. As Officer Korner approached the respondent he saw something yellow sticking out of the respondent's hand. The respondent put that hand in her coat pocket.

9. Officer Korner thought the respondent was trying to hide the object in her hand. In his experience he has seen people in possession of narcotics try to conceal the drugs in the tear of a coat pocket. it also occurred to Officer Korner that the respondent could be going for some type of weapon in her pocket.

10. Because the respondent could have a weapon in her pocket or be in the process of concealing or destroying evidence, Officer Korner asked the respondent to remove her hand from her pocket and asked her what was in her hand.

11. The respondent said nothing was in her hand. Officer Korner motioned to the respondent to give him what was in her hand. The respondent gave Officer Korner a clear cellophane wrapper which contained a crumpled yellow tissue.

12. Officer Korner had seen rock cocaine packaged and concealed in this fashion on prior occasions. Officer Korner squeezed the tissue to feel the objects inside and felt several hard objects that he believed to be rock cocaine. Officer Korner opened up the tissue and saw what appeared to be about twenty rocks of cocaine and cocaine powder.

13. Officer Korner arrested the respondent because he believed she was in possession of narcotics. Only a few minutes passed from the time Officer Korner got out of his patrol car to the time he opened up the tissue.

14. The respondent testified that she had just left a food market carrying a bag full of junk food in her left hand and rock cocaine in her right hand. She said that when the police officer approached her she was eating a candy bar with her left hand and sharing it with her sister and holding the rock cocaine in her right hand. The respondent's testimony was not believable.

15. The substance found by Officer Korner was analyzed by forensic drug analyst Jeffrey Lew and found to be 2.6 grams of cocaine.

[Pressley was convicted of possession of a controlled substance.]

ISSUES AND RULINGS: (1) Was there reasonable suspicion to justify the Terry stop of Pressley? (ANSWER: Yes, rules a 2-1 majority); (2) Was the search justified as part of the investigatory stop under Terry v. Ohio? (ANSWER: Yes, rules a 2-1 majority) Result: King County Superior Court conviction for possessing a controlled substance affirmed.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

(1) Reasonable Suspicion

> In the absence of probable cause to arrest, police may briefly detain and question an individual if they have '"a well founded suspicion based on objective facts that [she] is connected to actual or potential criminal activity."' . . . A "reasonable" or "well founded" suspicion exists if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." . . .
>
> . . . While "the circumstances must be more consistent with criminal than innocent conduct, 'reasonableness is measured not by exactitudes, but by probabilities.'" . . . In reviewing those circumstances, courts may consider such factors as the officer's training and experience, the location of the stop, and the conduct of the person detained. . . . Other factors that may be considered in the context of determining whether a stop was reasonable include '"the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained."' . . .
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> . . .
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> Here, the trial court correctly concluded that there was sufficient articulable facts to reasonably justify the stop. As Officer Korner indicated, his attention was initially drawn to the two girls by the manner in which there were huddling together and examining an item in Pressley's hand. This suggested to Officer Korner, based on his experience with drug transactions generally and with the area in particular, that he might be observing a narcotics transaction. While this behavior in itself was susceptible to a number of innocent explanations and insufficient to justify the stop, the manner in which the girls reacted to the officer's presence prior to the actual stop -- Pressley's exclamation, "Oh Shit", and the fact that they immediately walked in different directions -- was sufficiently consistent with behavior suggesting that a drug buy was taking place to justify the stop. Had their behavior after they saw Officer Korner but before he stopped Pressley not been entirely consistent with an incipient drug deal, there would not have been a sufficient basis for a valid Terry stop. Here, however, it was the defendant's behavior itself which supplied the additional inferences necessary to provide an articulable basis for the officer's suspicion that what he was witnessing was probably illegal activity. While the officer's basis for the stop hovers near the line between sufficient and insufficient grounds for a Terry stop, it did amount to more than simply an "inarticulable hunch". The officer articulated a series of observations which, when seen in the light of his experience and training, establish a well founded suspicion based on objective fact that he was observing illegal drug activity. It was therefore not unreasonable for Officer Korner to briefly detain Pressley to investigate further.

The scope of the initial detention was limited to dispelling or confirming his suspicions in that regard. The stop was not improper.

(2) Scope of Search

The question remains whether the permissible scope of a Terry stop was exceeded by seizure of the cocaine in Pressley's possession. The scope of a search after a Terry stop is generally limited to a search for weapons, and then only when a reasonable belief exists that the defendant is armed and dangerous. . . . Where the actions of the person being detained give rise to a reasonable suspicion that the person possesses evidence which is in danger of being destroyed or lost, however, the investigating officer may take reasonable action, including seizure of evidence, consistent with the initial stop to further investigate and to protect the possible evidence. . . . At that point, if probable cause exists or the elements of "plain view" are satisfied, no warrant is required for further examination of the evidence. . . .

Here, Officer Korner saw a yellow item in Pressley's hand as he approached her, just before she put her hand in her coat pocket. Because he was aware that persons in the possession of narcotics may try to conceal them through a tear in the pocket of their coat, and because, given the location, it was possible that Pressley might have had a weapon, the officer did not go beyond the permissible scope of this investigatory stop in asking her to remove her hand or to show him what was in it. Had it not been for her furtive gesture, the officer's request may not have been justified. . . . That, however, was not the situation here.

The officer's request was further justified by the fact that here, . . . Pressley replied "Nothing" when asked what was in her hand. In both cases, the officer had seen something in the defendant's hand and thus knew that, whatever it was, it was not "Nothing". . . . The officer's suspicions were not dispelled by the response given. Rather, Pressley's response both confirmed his suspicions and was consistent with the reason for the initial stop. Under these circumstances, Officer Korner's subsequent request that Pressley show him what she had in her hand was not unreasonable.

The officer's requests were directly related to dispelling or verifying his suspicions. The physical intrusion was minimal and limited to the defendant's closed hand, the contents of which she had tried to conceal. The search here therefore did not exceed the permissible scope of this Terry stop. Once the officer saw the packet and felt its contents, again taking into account his training and experience, there was probable cause to believe that Pressley was in possession of a controlled substance.

[Footnote, some citations omitted]

PC BASED IN PART ON OFFICER SMELLING GROWING MARIJUANA

State v. Remboldt, 64 Wn. App. 505 (Div.III, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

The search warrant was requested by Spokane Detective Madsen. His affidavit contained the following factual assertions:

A young informant (aged 10 to 25) told Deputy Howard about a marijuana grow operation he observed in the basement of a residence located at 2019 East Buckeye in Spokane. On August 1, 1989, Deputy Howard drove by the residence and confirmed the color of the house and the type of trucks parked there, all as described by the informant. Deputy Howard also confirmed that Barrett and Shirley Remboldt (Remboldts) were the occupants of the residence.

On August 8, Deputy Van Leuven and Detective Madsen went to the Remboldts' residence to investigate. Ms. Remboldt was present and spoke with Deputy Van Leuven on the front porch, but refused to allow the officers inside. At one point, the Remboldts' two sons closed the door. As the door to the house closed, Deputy Van Leuven was said to have "smelled from inside the house area what he recognized from his training and experience . . . as . . . marihuana". Attached to the affidavit was a summary of Deputy Van Leuven's training and experience, as well as the training and experience of Detective Madsen.

Detective Madsen averred that Ms. Remboldt said she was going to call her husband. Approximately 15 minutes later, a male arrived and told the officers to "Get a warrant". A search warrant was obtained.

Several jars of marijuana buds, four plants, harvested leaves, and miscellaneous paraphernalia were seized from the Remboldts' home pursuant to the warrant. The plants were found in between floor joists in the basement, and uncured wet leaves were found next to the toilet on the main floor.

Remboldts were charged by information with one court of possessing marijuana with intent to manufacture. Defense counsel filed a motion to suppress, contending the reliability of the young informant had not been established, there was no probable cause for issuance of the warrant, and the State failed to disclose events to the magistrate which negated probable cause. At the suppression hearing, the trial court heard testimony from Deputy Van Leuven, Detective Starr, Dr. W.J.Woodford, the Remboldts, and the Remboldts' 11-year-old son.

Deputy Van Leuven testified the odor he smelled when the Remboldts' door was being closed was the "moderate odor" of marijuana. He testified he had visited at least 150 indoor marijuana growing operations in the preceding 3 years and had obtained 70 to 75 search warrants based upon his smelling marijuana. He had been correct every time. He testified he had no doubt it was marijuana he smelled when the Remboldts' door was being closed. He also testified he and another officer had gone to the Remboldts' residence the day before, attempting to gain entry by using a ruse.

Dr. Woodford, chemist and expert witness for Remboldts, testified it was his opinion the deputy could not have smelled marijuana. His opinion was based primarily on the variety of marijuana seized, the immaturity of the plant samples he tested, and the alleged location of the marijuana. He testified an immature marijuana plant has the same aroma as several other plants, including juniper. It was not disputed that juniper bushes grew in front of the Remboldts' house.

> Mr. Remboldt testified that on the day the warrant was issued he had about 12 marijuana plants at different stages of growth. He said he began flushing the small marijuana plants down the toilet, along with the leaves of larger plants, while the officers were obtaining the search warrant. He testified his oldest plants were 4 to 6 weeks from budding at the time they were seized.
>
> The trial court found that Deputy Van Leuven smelled what he believed or perceived to be marijuana. However, there was a question whether the smell was the result of "selective perception" -- a phenomenon whereby "if someone suggests a particular odor might be smelled, that individual might well smell it even though it might be something else". Neither party argued the issue of reliability of the young informant at the suppression hearing.
>
> The trial court concluded that although the issuing magistrate had the right to rely on the affidavit supporting the warrant, the warrant failed because of the question whether the deputy (a) smelled the marijuana growing in the house or (b) smelled the juniper growing outside.

[Footnotes omitted]

ISSUE AND RULING: Did the affidavit establish probable cause to search the house for marijuana? (ANSWER: Yes) Result: Spokane County Superior Court suppression order reversed; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> A magistrate's determination that a warrant should issue is given deference and, since the issuance of the warrant is a matter of judicial discretion, it is reviewed under the abuse of discretion standard.
>
> In reviewing a probable cause determination, the information considered is that which was before the issuing magistrate. . . .
>
> The experience and expertise of an officer may be taken into account in determining whether there is probable cause. In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer. An assertion that marijuana was smelled by an officer must be presented to an issuing magistrate as "more than a mere personal belief." . . . An officer's particular expertise is thus critical. . . .
>
> At the suppression hearing, Deputy Van Leuven testified fully concerning his prior experience, expertise and ability to smell marijuana. The court did not disregard his testimony, nor disbelieve it. Instead, the court adopted a subjective standard of probable cause based on technical information unavailable to the issuing magistrate.
>
> The question of probable cause should not be viewed in a hypertechnical manner. . . . A court should not confuse and disregard the difference between what is required to prove guilt and what is required to show probable cause for a search.
>
> The issuing magistrate was fully informed of the experience and expertise of

Deputy Van Leuven, and the information contained in the affidavit was based on more than the deputy's mere personal belief. Further, this information corroborated the young informant's tip. The issuing magistrate had reasonable grounds for concluding the Remboldts were involved in a marijuana grow operation and the items sought would be located in their home. There was probable cause for issuance of the search warrant and the trial court erred in suppressing the evidence seized pursuant to it.

[Citations, footnotes omitted]

MERE CONTACT BECAME SEIZURE ON OFFICER'S ORDER TO EMPTY POCKETS

State v. Richardson, 64 Wn. App. 693 (Div. III, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

Late on the night of March 30, 1990, [a] Yakima Police Officer was patrolling an area on the southeast side of Yakima known for its high drug activity. On three occasions, over a period of 4 hours, he observed an unfamiliar Mexican male engage in suspicious activity consistent with "running drugs". The individual, later identified as Tom Gonzales, would stand on a corner, then approach people in cars and talk with them. Whenever [the officer] or another patrol car approached, he would walk away and disappear. On the third occasion, at 2:30 a.m., March 31, 1990, Mr. Gonzales saw the officer at Third Street and Maple, turned around, walked in the opposite direction toward Second Street and Maple, and again disappeared.

Twenty minutes later, [the officer] saw Mr. Gonzales come around the corner at Third Street and Maple, walking with an unknown white male later identified as Mr. Richardson. He turned and pulled up next to the two men. [The officer] got out of his patrol car and asked them if he could talk to them for a few minutes. He then had them empty their pockets and place both the contents and their hands on the car. [The officer] requested identification, explained the area was known for its drug activity and asked them if they lived in the area. Mr. Richardson told the officer he did not live there; he had been at the Route 66 Bar at Ninth Street and Yakima and was walking to his parents' home in the 1500 block of Lincoln. The officer commented he had not chosen the most direct route. [The officer] testified he then asked whether either of the men used drugs or had any on them. They both replied they did not. He further testified Mr. Richardson consented to a search of his pockets by stating "Go right ahead. I don't use drugs. I will take any test to prove it." Mr. Richardson testified [the officer] searched him without requesting or receiving his consent.

[The officer] found a small, white paper folded in a way commonly used to package cocaine in Mr. Richardson's right front coin pocket. When asked what it was, Mr. Richardson claimed he did not know what was in the paper or how it had gotten there. [The officer] then arrested him. The paper bindle contained cocaine.

Mr. Richardson moved to suppress the cocaine. Following the suppression hearing, the court concluded the case did not involve an investigatory stop, but a consensual one followed by a consensual search.

[Richardson was convicted of possession of a controlled substance, cocaine.]

ISSUE AND RULING: Was Richardson unlawfully stopped without reasonable suspicion before he consented to the search of his pants pockets? (ANSWER: Yes) Result: Yakima County Superior Court UCSA conviction reversed, charge dismissed.

ANALYSIS: (Excerpted from Appeals Court opinion)

> Not every encounter between an officer and an individual amounts to a seizure. In Washington, a police officer has not seized an individual merely by approaching him in a public place and asking him questions as long as the individual need not answer and may simply walk away. However, once the officer restrains the individual's freedom to walk away, he has seized that person. Restraint amounting to a seizure occurs if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."
>
> Here, the initial contact between [the officer] and the two men was a permissible encounter which did not intrude upon Mr. Richardson's constitutionally protected liberty or privacy. However, the officer then had them both empty their pockets and place their hands on the patrol car while he questioned them. That conduct constituted a show of authority which transformed the encounter to a Fourth Amendment seizure because the objective facts would lead any reasonable person in Mr. Richardson's position to believe he was no longer free to leave.
>
> To justify the seizure of Mr. Richardson, the conduct of [the officer] must next be tested for reasonableness. The officer must be able to point to specific and articulable facts giving rise to a reasonable suspicion that there is criminal activity afoot. A person's presence in a high crime area does not, by itself, give rise to a reasonable suspicion to detain him. Nor does an individual's mere proximity to others independently suspected of criminal activity justify an investigative stop; the suspicion must be individualized. [The officer] may well have had a reasonable suspicion Mr. Gonzales was engaged in criminal activity, but he did not articulate objective facts warranting a reasonable suspicion of Mr. Richardson. At the time of the seizure, [the officer] knew only that Mr. Richardson was in a high crime area, late at night, walking near someone the officer suspected of "running drugs". He had not heard any conversation between the men and had not seen any suspicious activity between them. [The officer's] detention of Mr. Richardson was an unreasonable seizure in violation of his constitutional rights. Because the seizure was improper, the evidence seized in the subsequent search must be suppressed.

[Footnote, citations omitted]

NO PRIVACY PROTECTION FOR TRESPASSING CAMPER

State v. Pentecost, 64 Wn. App. 656 (Div. III, 1992)

Facts and Proceedings: (Excerpted from Court of Appeals opinion)

> On August 6, 1989, a citizen complained to the Goldendale Police Department that

a trespasser was camped on his property. The citizen also observed what he believed to be marijuana plants growing on his property. he directed law enforcement officers of the Goldendale Police Department and the Klickitat County Sheriff's Office to the site of the trespass. The encampment was across the creek from an old Boy Scout camp, in an area which was not posed with "no trespassing" signs.

Officers Robert Kindler and Mark Bond of the sheriff's office approached the camp. Mr. Pentecost was sitting on a chair in front of a tent. Officer Kindler informed him he was trespassing, and asked him to identify himself. When Mr. Pentecost went into his tent to get his identification, Officer Bond was able to see a shotgun inside the tent. He advised Mr. Pentecost he was going to secure the shotgun, and entered the tent for that purpose. Mr. Pentecost did not object. He told Officer Kindler he had been residing at the campsite for approximately 6 weeks.

Officer Kindler proceeded downstream some three-quarters of a mile to the marijuana site while Officer Bond remained with Mr. Pentecost. During this time, Officer Bond conducted a cursory search of the camp looking for weapons. Next to the tent, he saw a gallon of Alaska Fish Fertilizer; a second fertilizer, blue in color; and a product called "Repel", which is used to keep animals away from growing plants. Between the tent and the creek, he observed a pair of boots with a flood tread design on the sole. On top of a table outside the tent he saw an open can with nails in it. Officer Kindler radioed Officer Bond and reported finding similar fertilizers, "Reppel", and nails at the marijuana site. In addition, footprints showing a flood tread design were present at the grow location, as was green twine similar to that used in a clothesline at the campsite.

Based on the information received form Officer Kindler and on his own observations, Officer Bond arrested Mr. Pentecost for manufacturing marijuana. He conducted a pat-down search of Mr. Pentecost, and seized a small amount of marijuana from his person. He also found marijuana in the tent, and a book entitled "Marijuana Grower's Guide" in a sack outside the tent.

The court concluded Mr. Pentecost was a trespasser, with a limited expectation of privacy, if any, in only his tent. The court held (1) Mr. Pentecost had no expectation of privacy in the area surrounding the tent, (2) the items observed by Officer Bond at the campsite were in open view, and (3) the items seized from the tent and the sack after Mr. Pentecost's arrest were discovered in the course of a proper inventory search.

All of these items were admitted in evidence in Mr. Pentecost's bench trial for manufacturing marijuana.

[Pentecost was convicted of manufacturing marijuana.]

ISSUE AND RULING: Did the officers' entry into Pentecost's campsite violate his reasonable privacy expectations as protected under the Fourth Amendment? (ANSWER: No) Result: Klickitat County Superior Court conviction for manufacturing a controlled substance affirmed.

ANALYSIS:

At the outset, the Court of Appeals notes that the leading U.S. Supreme Court case on Fourth Amendment privacy is Katz v. U.S., 389 U.S. 347 (1967). Katz established a two-pronged test, both prongs of which must be met for privacy protection to be found: (1) Has the individual exhibited a subjective expectation of privacy in the area? and (2) Is that subjective expectation of privacy a reasonable expectation in the eyes of society? The Court of Appeals' analysis of the privacy issue under Katz continues as follows:

> The second prong of Katz v. United States, 389 U.S. 347 (1967) [the leading case on Fourth Amendment privacy protection] is dispositive here. Assuming Mr. Pentecost had a subjective expectation of privacy in the area surrounding his campsite, is it one that society is prepared to recognize as justified? Mr. Pentecost argues a campsite is an area which society ordinarily understands affords privacy. He analogizes it to other types of residences and their surrounding curtilage to which constitutional protections clearly apply.
>
> Mr. Pentecost cites no direct authority for his assertion society regards unenclosed items left around a campsite as private. As for his analogy to the curtilage of a residence, we see material distinctions between a campsite and such an area. Principal among these distinctions is the fact a homeowner or tenant has the right under property law to exclude others. We know of no similar right in one who trespasses and camps upon another person's land. In State v. Dess, 655 P.2d 149 (Montana, 1982), the court relied upon the deputies' "legal right to be where they were" in holding the defendant had no reasonable expectation of privacy which would mandate suppression of items seized from the area around his pickup camper in a national forest campsite. **[LED EDITOR'S COMMENT: Park Rangers take note. Dess involved a non-trespass situation; no privacy in area surrounding camper lawfully situated in park site. Interior of camper would be protected, however, as would the interior of Mr. Pentecost's tent have been protected.]**
>
> Since Mr. Pentecost was a trespasser, he has even less of an argument than the defendant in Dess for recognition of a privacy interest in his campsite. We hold Mr. Pentecost did not have a reasonable expectation of privacy in the area surrounding his tent. Officer Bond's observations while walking through the campsite, coupled with the information from Officer Kindler that the same types of items were present at the marijuana grow site, gave him probable cause to arrest Mr. Pentecost. . . . The subsequent search of Mr. Pentecost's person in which a small amount of marijuana was discovered was a proper search incident to a valid arrest.

[Footnotes, some citations omitted]

LED EDITOR'S COMMENT:

We don't want to be considered insensitive to civil liberties, but we think that this privacy argument by defendant should be filed in the "ludicrous" file.

****

PAYTON/STEAGALD RULE:

A SEARCH WARRANT IS A GOOD IDEA BUT A SEARCH WARRANT IS NOT REQUIRED TO ENTER A PERSON'S OWN RESIDENCE TO ARREST HIM; AN ARREST WARRANT PLUS REASON TO BELIEVE THE PERSON IS PRESENT IS THE STANDARD. A SEARCH WARRANT IS NECESSARY FOR ENTRY OF A 3RD PARTY RESIDENCE TO ARREST OF A NON-RESIDENT.

Apparently there is some bad information out there regarding the requirements for entry of a premises to make an arrest. The rules are as follows:

PERSON'S OWN RESIDENCE

In order to forcibly enter a person's own residence to make an arrest (assume no consent or exigent circumstances), law enforcement officers must have at least an arrest warrant plus reason to believe the person is presently there. A search warrant will justify entry to arrest but is **not required in this circumstance**. Probable cause to arrest, alone, absent an arrest warrant or search warrant, will not justify forcible entry to arrest. If entry is lawfully obtained by consent or occurs under exigent circumstances, then the arrest may be lawfully made. See Payton v. New York, 445 U.S. 573 (1980); U.S. v. Underwood, 717 F.2d 482 (1983) Jan. '84 LED:13. Note that the otherwise excellent 90-page publication -- "Search and Seizure" -- prepared for the Washington Association of Prosecuting Attorneys by Richard L. Sayre (former Spokane County Deputy Prosecutor) and last updated in 1989: (a) incorrectly states at page 29 that a search warrant is required to enter a person's own residence to arrest that person, and (b) cites Underwood for this proposition even though Underwood does not support that proposition.

THIRD PARTY'S RESIDENCE

In order to enter a third party's residence to make an arrest (assume no consent or exigent circumstances), law enforcement officers must have a search warrant authorizing the forcible entry. Mere probable cause to arrest or the existence of an arrest warrant to arrest a non-resident third person presently in the residence, will not justify entry. If entry of the third party's premises is obtained by consent or exigent circumstances, then the arrest may be made. See Steagald v. U.S., 451 U.S. 204 (1981).

DWI ARRESTEE'S RIGHT TO ADDITIONAL BREATH OR BLOOD TEST

Recently, we have received a few inquiries regarding the DWI arrestee's right to an additional alcohol test under RCW 46.20.308 and 46.61.506, and the duty, if any, of law enforcement officers to help the arrestee to obtain such an additional test.

It is our opinion that the only duty of law enforcement is to not affirmatively frustrate the person's effort to obtain another test. This duty is satisfied, we believe, if, after any law enforcement testing is completed in reasonably timely fashion, the arrestee is released. The arrestee is completely on his or her own in trying to obtain an additional test at this point. The arrestee, not the officers, will have to worry about chain-of-custody of any evidence obtained, we presume. We base our opinion on two Washington cases Blaine v. Suess, 93 Wn.2d 722 (1980) Sept. 80 LED:02 (law not complied with by officer who booked arrestee into jail, denying his request for a blood test); State v. Reed, 36 Wn. App. 193 (Div. III, 1993) May '84 LED:07 (law not violated where arresting officer offered alternative of having qualified technician come to jail to take blood sample). See also a collection of cases from other jurisdictions at 45 ALR 4th 11-76.

A different situation is presented where the arrestee is to be booked into jail, rather than being released, after completion of any law enforcement testing. In this circumstance, it appears that a law enforcement officer should transport the person who makes a timely request for such an additional test to a hospital which will perform such a test. We assume that the arrestee will have to pay for such a test (although we anticipate that indigent arrestees may argue that the government should pay for the test, and it may therefore be a safer practice to front the money for the test of the person who is not going to be released immediately). As an alternative to such transportation to a hospital, it appears that an officer may bring a technician to the jail as was done in the Reed case cited above.

We have been asked if the right to an "additional" test exists if the arrestee refuses the law enforcement BAC testing. Although we concede this is a close question on which there is no case law directly on point, we think the answer is "yes". See the ALR annotation cited above and see Greenwood v. DMV, 13 Wn. App. 624 (1975).

Finally, we have been asked about the recent unpublished (and hence non-precedential) decision of Division III of the Court of Appeals in City of College Place v. Zitterkopf, No. 10971-2-III (which we digested in March '92 LED:19. In Zitterkopf the Court of Appeals reviewed a case where the arrestee had made a request for an additional test about ten minutes after he had been booked into jail following BAC tests (.15 and .16 readings) and after the arresting officer had left the jail and resumed patrol. The Court of Appeals held that the government had a duty to facilitate the obtaining of such a test for the incarcerated man. While this decision in Zitterkopf seems unreasonable to us, we nontheless recommend that if this rare fact situation should arise again in the future, an effort be made to facilitate that inmate's obtaining of such a test through one of the means discussed above . . . Consult your prosecutor and/or assigned legal advisor.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions expresses the thinking of the writer and does not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.